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RECENT DECISIONS OF THE SUPREME COURT RELATING TO CITIES AND TOWNS.

It gives us great pleasure to put in type for circulation amongst our readers the following able article which was read by Hon. Henry A. Pollard before the League of Virginia Municipalities at its meeting in Richmond on the 15th and 16th of January. We think it worthy of careful perusal and of more extended knowledge amongst the profession.

Mr. President and Gentlemen of the League:

On the subject, "Recent Decisions of the Supreme Court Relating to Cities and Towns," I beg to submit the following:

On July 15, 1904, the Honorable Mayor of the City of Richmond approved an ordinance entitled, "An ordinance to prohibit City Officials, Employees or Members of any Municipal Board in connection with the City Government to serve as Judge, Registrar or Clerk at any election, regular or primary, or as member of any standing Committee of any Political Party," and soon thereafter, John J. Lynch, a member of the Common Council of the City of Richmond, and Walter G. Duke, a member of the Board of Police Commissioners of the City of Richmond, were summoned to appear before the Police Justice of the City of Richmond, to show cause why they should not be fined for a violation of the prohibition of said ordinance, it being charged that the said Lynch was a member of the State Democratic Committee and that the said Duke was a member of the City Democratic Committee, both of which were standing committees of the Democratic Party, and upon the hearing of the said cases, the defendants were convicted and fined by the justice. From this decision an appeal was taken to the Hustings Court of the City of Richmond, where the cases were heard on a motion made by the defendants to quash the summons in each case, the reasons therefor being based mainly upon the contention that the said ordinance was "unconstitutional, null and void," which mo-

tion the court sustained and held the said ordinance to be unconstitutional and void. From this decision of the Hustings Court an appeal was taken to the Supreme Court of Appeals of Virginia where the same was, after full argument, heard and determined on January 17, 1907, and the judgment of the Hustings Court affirmed.

On behalf of the City of Richmond it was earnestly contended, that the ordinance was enacted in the exercise of the police power vested in the Council to enact suitable ordinances deemed essential by them "to the safety, health, peace, good order and morals of the community," for such was laid down by the Supreme Court of the United States as the limits of the police power in the case of Jacobson *v.* Mass., 197 U. S. 11, 26. And inasmuch as the Council conceived that the public weal required, that all municipal officers, who either directly or indirectly owed their election to some political party, acting through its standing committees, should not at the same time be members of such committees, for the obvious reason that to hold the two positions would give an undue advantage over other eligible citizens who might aspire to positions of honor and trust under the city government—in other words, that the Council had a right to determine, and had, by said ordinance, in effect determined that the position of a municipal officer was *incompatible with the position of membership upon a committee of a political party.* And that having thus determined the question of incompatibility, the Council had a right to prohibit the holding of both at the same time and further to declare that the acceptance of one of these offices was. *ipso facto,* the relinquishment of the other.

In England and in this country it had been fully recognized, as was strongly urged upon the attention of the trial court, as well as upon the attention of the Supreme Court of Appeals, that legislative bodies have a right to declare certain offices incompatible, and that making such declaration is not to curtail or enlarge the qualifications for office.

To sustain this contention the great case of Milward *v.* Thacker, 2 T. R. 81, 89; and the cases of Commonwealth *v.* Hawkes, 123 Mass. 525, 529-530; People *v.* Clute, 50 N. Y. 451, 468; Amory *v.* Justices of Gloucester, 2 Va. Cases 523,

and Bunting *v.* Willis, 27 Gratt. 144, 154 were cited; though no case exactly like the one under advisement could be cited, inasmuch as in the field of legislation little had been attempted to secure purity of elections, certainly not by municipal legislative bodies. The attention of the court was also called to the case of Knoxville Iron Co. *v.* Harbison, 103 Tenn. 421, affirmed in the Supreme Court of the United States in 183 U. S. 13, where it was said: "The police power is sufficiently comprehensive to embrace new subjects as conditions demand." With the greatest confidence the court was pointed to the case of Ex parte Curtis, 106 U. S. 371, where a United States statute was upheld prohibiting the giving or receiving from any officer of the United States money or property for political purposes. The law was upheld upon the broad ground that it had a tendency to eliminate from the election or appointment of officers improper influences, and to promote efficiency and integrity in the administration of public trusts.

That great Tribunal in Powell *v.* Penn, 127 U. S. 678, expressly held, that it was clearly within the exercise of the police power to pass statutes or ordinances intended to prevent fraud. That is just what the ordinance was intended to prevent, and yet our Supreme Court of Appeals, in an opinion less than two pages in length, set aside the ordinance, placing its decision upon the ground that the Constitution had defined the qualification of officers, and that it was not within the power of a legislative body to superadd to those qualifications, thus ignoring altogether the well-recognized principle contended for *that certain offices may be declared incompatible.* The counsel, who maintained the constitutionality of the ordinance, in vain pointed out and cited authorities of the greatest weight to establish the fact that eligibility to office prescribed in the Constitution was an entirely different thing from the *incompatibility* of two offices, and that legislative bodies were not handicapped in making a declaration that a person holding one of such incompatible offices should not hold the other, for a person holding one office might easily relinquish the other and thus be eligible to the other position. But another ground on which the decision was placed, which if sound was ample, was that the charter of the City of Richmond conferred no *express authority* upon

the Council of the City of Richmond to pass such an ordinance, ignoring, as it was supposed, the well-recognized doctrine that the power to enact ordinances within the police power need not be expressly authorized. This important case, which materially limits and circumscribes, as the writer believes, the implied powers of a municipal corporation, is reported in 106 Va. at page 324. The writer expresses with the greatest deference the confident belief that it will have to be reviewed and reversed, or materially modified, in the future.

Another case of unusual interest is the case of City of Richmond *v.* Caruthers, 103 Va. 774, in which the Supreme Court of Appeals of Virginia held that dead animals are not nuisances *per se* and cannot be made such by legislative declaration; and while a municipality has ample authority, in the exercise of its police power, to protect the public against nuisances *per se,* or anything that is likely to become an offensive or dangerous nuisance, it cannot, in the first instance, in the absence of such conditions, deprive the owner of his property in the carcass of a dead domestic animal without providing due process of law. A municipal ordinance, therefore, which, immediately upon the death of a domestic animal, and before it has become a nuisance or dangerous to public health deprives the owner of his property therein and vests it in a public contractor, is the taking of private property without due process of law, and is void.

In this case the police justice, John J. Crutchfield, who upheld the constitutionality of the ordinance, has the unique distinction, after being reversed by the Hustings Court of the City of Richmond and by the Supreme Court of Appeals of Virginia, of having his decision upheld by the Supreme Court of the United States.

The learned judge who delivered the opinion of the Supreme Court of Appeals of Virginia, places his decision on the following grounds:

"The doctrine fairly deducible from the authorities is that an ordinance, which, immediately upon the death of a domestic animal, and before it becomes a nuisance or dangerous to the public health, deprives the owner of the property therein and vests it in the public contractor, is a taking of private property without due process of law within the meaning of the Fourteenth

Amendment of the Constitution of the United States, and, therefore, void."

The case determined in the Supreme Court of the United States which had the effect of reversing our Supreme Court of Appeals was decided November 27, 1905, under the style of Cal. Red. Co. *v.* San Francisco Red. Co., 199 U. S. 306, 324. There an ordinance of the City of San Francisco was claimed to be unconstitutional for the same reasons as those urged against the Richmond "Dead Horse" Ordinance. The ordinance required that all garbage and other refuse matter should be delivered by the owner at the City Crematory or reduction plant, there to be cremated or destroyed at the expense of the person to whom it belonged. This was undoubtedly a much more stringent and apparently a more unreasonable regulation than that contained in the ordinance of the City of Richmond which only allowed the city to take charge of and remove all horses dying on the streets, yet the Supreme Court of the United States, re-affirming and applying the doctrine laid down in another case, said:

" 'The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.' In Sedgwick's Treatise on Statutory and Constitutional Law, the author says that 'the clause prohibiting the taking of private property without compensation is not intended as a limitation * * * of those police powers which are necessary to the tranquility of any well-ordered community, nor of that general power over private property which is necessary for the orderly exercise of all governments. It has always been held

that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is made.' Pp. 434, 435."

Bearing in mind that the unconstitutionality complained of related to the Federal and not the State Constitution, it becomes somewhat curious that a State Supreme Court should be more jealous in preserving inviolate the Federal Constitution than the Supreme Court of the United States. It is fortunate, however, that the maintenance of wholesome sanitary and other police powers, have as a final arbiter a court of such broad and progressive views as the Supreme Court of the United States.

The next case I beg to call attention to is the case of Adams *v.* City of Roanoke, 102 Va. 53. The importance of this decision to the cities and towns of the Commonwealth would be hard to estimate. It is the undoubted concensus of opinion among the persons who have given the best thought to municipal improvements that the making of local assessments for the improvement of streets and alleys is vastly important if not essential to the speedy development and improvement of the streets and alleys of cities and towns.

Three former cases decided by the Supreme Court of Appeals of Virginia, the first under the style of Violett *v.* Alexandria, 91 Va. 561 (decided in 1892); second, Heth *v.* Radford, 96 Va. 272 (decided in 1898); and the third of Norfolk *v.* Young, 97 Va. 728 (decided in 1900), had well nigh emasculated, set aside and destroyed every statute and ordinance passed in pursuance thereof, providing for the assessment for local improvements. All of these cases, be it observed, had held the statute or ordinance unconstitutional on the ground that they were violative *not of the State, but of the Federal Constitution.* In the first of these cases (Violett *v.* Alexandria), in order, as it was believed, to conform to the views of the Supreme Court of the United States, recently before then expressed in the case of Norwood *v.* Baker, reversed a long line of Virginia decisions which had held that such assessments made on the front foot basis were valid and constitutional; among these notably the case of Ellis *v.* Norfolk City, 26 Gratt 227, where it was held, without reservation, that "the Council of the City of Norfolk had authority under the charter of the city to assess the expense of a part of

the cost of paving a street upon the owners of the property upon the street, upon the ratio of the front foot of their lots facing on the streets." This case (Norwood *v.* Baker), which our Supreme Court of Appeals was seeking to follow, was reported in 172 U. S. 260. Fortunately, however, after the Supreme Court of Michigan had refused to follow it without question, it was reviewed by the Supreme Court of the United States in the case of French *v.* Barber Asphalt Paving Co., 181 U. S. 324, where the court, speaking through Mr. Justice Harlan, was pleased to say that the decision of Norwood *v.* Baker had been misunderstood and misapplied, and by reference to the syllabus of the case (French *v.* Barber, etc.), it will be seen that the doctrine of Ellis *v.* Norfolk was sustained, the broad proposition being laid down that "the apportionment, of the entire cost of a street pavement upon the abutting lots according to their frontage, without any preliminary hearing as to benefits, may be authorized by the legislature, and this will not constitute a taking of property without due process of law," thus in effect, recognizing the doctrine in Ellis *v.* City of Norfolk, which our Supreme Court had overruled in Violett *v.* Alexandria.

In the second of the cases referred to, Heth *v.* Radford, not a special assessment case at all, for it related to the constitutionality of an ordinance of the Town of Radford, which proposed to make a different assessment of property in that town from the state assessment, the court very properly held that under § 6 of article 10 of the State Constitution, the taxes in all the cities and towns of the Commonwealth for municipal purposes must be assessed upon the state valuation, and not upon a special valuation made by the town, and was also violative of § 1040 of the Code of Virginia, 1887, which required that the assessment of real estate for municipal taxation shall be the same as the assessment there for state taxation.

In the third of these cases, Norfolk *v.* Young, the assessment for the local improvement was ordered in 1892, and to meet the requirement as to notice there was only a publication of the resolution ordering the improvement, which gave no notice to the property owners of the place where, or time when, they might appear and contest the validity of the assessment. Judge Buchanan said in regard thereto: "The notice required and given,

wholly failed to designate a tribunal before which, a place where, or a time when the party effected had the right to appear to expose an alleged wrong in the assessment imposed upon him and his property." In the maze of these conflicting and irreconcilable decisions on the subject of local assessments, one can appreciate what confusion, uncertainty and misapprehension existed in regard to what was, and what was not, essential in order to conform to the constitutional requirement of "due process of law," hence the case of Adams *v.* Roanoke was a decision that gave great satisfaction to bench and bar and cleared up the confusion in which the matter was involved. That case held that the act of March 7, 1900 (Acts, 1899-1900, p. 1144) incorporated into the Code of Virginia, 1904, as § 1014a was constitutional and valid. I know of no decision rendered in the last quarter of a century more affecting the revenues of the cities.

In view of the provisions of the present constitution, which prohibits the damaging of private property for public use without making just compensation therefor, the case of Swift & Co. *v.* City of Newport News, 105 Va. 108, is a case which greatly concerns the cities and towns of the Commonwealth. In that case our Supreme Court of Appeals, in an able and lucid opinion, establishes the doctrine as to the measure of damages, where, by municipal action, in the grading or otherwise improving streets and alleys, private property is damaged. From the syllabus of the case it will be seen that the court holds, that where private property has been simply damaged by a public improvement, but no part thereof has been taken, the *measure of damages is the diminution of the value of the property by reason of the improvement—difference between the fair market value of the property immediately before and after the construction of the public improvement,* but the cost of adjusting the property to the improvement, as, for example, the cost of laying a new sidewalk, is a proper element to be taken into consideration in determining whether the property has been depreciated in value or not, *but is not to be considered separately and independent of the enhanced value of the property by reason of the improvement.* The importance of this decision will be more and more apparent as the cities and towns which have recently annexed large areas of unimproved territory proceed to make public improvements.

and if the cities and towns are wise in establishing and making grades in advance of the erection of buildings, but little damage can be, under this rule, suffered and assessed in favor of the property owners, for only in rare instances, I apprehend, could it be successfully shown that the *market value* of unimproved property had been depreciated by the establishing and making of proper street grades.

This paper, though already too long, should not, however, be concluded without a reference to the case of County of Henrico *v.* City of Richmond, 106 Va. 284, where important constitutional questions were settled which deeply concerned the growth and development of the cities and towns of the Commonwealth.

The recent Constitutional Convention, deeming it unwise for the legislature longer to exercise the power of extending the corporate limits of cities and towns, declared that "The General Assembly shall provide by general laws for the extension and the contraction from time to time of the corporate limits of cities and towns, and no special act for such purpose shall be valid." (Section 126, art. VIII, of the Constitution.)

In obedience to this constitutional provision the General Assembly by the act approved March 10, 1904, provided by general law for the extension of the corporate limits of cities and towns, selecting and designating the circuit judges of the state as the governmental agency for carrying out the provisions of the law. (Code of Virginia, 1904, § 1014a.)

This provision of the statute, devolving upon the Circuit Courts the power to determine the necessity for and expediency of annexation, was violently assailed as unconstitutional and void, and especially as violative of the Bill of Rights, which provides, "that the legislative, executive and judicial departments of the state should be separate and distinct," and also of article 3 of the Constitution, which provides that "except as hereinafter provided the legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others, nor any person exercise the power of more than one of them at the same time." The court, after exhaustive argument and consideration of the multitudinous authorities cited on either side, in a lucid opinion by His Honor,

Judge Harrison, held that the act of the General Assembly known as the "annexation act," so far as its validity was called in question, was not in conflict with the constitutional provision relating to the separation of the powers of government. From this decision Judge Buchanan alone dissented.

I believe the decision certainly gave great satisfaction to progressive citizens of the several cities and towns of the Commonwealth who advocated enlargement and extension of municipal facilities, and met with the almost universal approval of the bench and bar of the state.

Thanking you for the opportunity of presenting this imperfect review of the recent decisions of the Supreme Court relating to cities and towns, and congratulating you upon the important work which you have accomplished and hope to accomplish for the betterment of the government of the several cities and towns of the Commonwealth, I beg to express the wish that your deliberations may be profitable and your stay in the capitol city enjoyable.